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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 678

EARL H. McDONALD AND JOSEPH F. WASHINGTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 28-31) have not yet been reported. The findings of fact and conclusions of law of the district court appear at pages 7-8 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered February 16, 1948 (R. 32). The petition for a writ of certiorari was filed March 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether gambling paraphernalia seized from McDonald's room at the time of his arrest was obtained in violation of the Fourth Amendment.

2. Whether petitioner Washington, who merely happened to be present at the time and who had no property interest either in the premises or the seized articles, is entitled to challenge the legality of the seizure.

STATEMENT

On August 26, 1946, petitioners McDonald and Washington were indicted in the United States District Court for the District of Columbia in four counts charging offenses in the carrying on of a lottery known as the numbers game, in violation of 22 D. C. Code 1501, 1502 and 1504 (R. 3-4). They waived a jury trial (R. 9) and were found guilty on all counts by the court. McDonald was sentenced to imprisonment for a term of six to eighteen months (R. 10). Washington was sentenced to imprisonment for sixty days (R. 10-11). Upon appeal to the Court of Appeals for the District of Columbia, the judgments were affirmed, one judge dissenting (R. 32).

The only issue in the case concerns the legality of the seizure of gambling paraphernalia from McDonald's room, on June 22, 1946. The facts

concerning this issue may be summarized as follows:

One Barbara Terry operates a rooming house at 1608 Third Street, N. W., in Washington, D. C. (R. 11, 15). In October 1945, petitioner McDonald, who had a home in Washington (R. 19), rented a room from her (R. 13), and this room was subsequently used for the operation of a lottery known as the numbers game (R. 18-19). McDonald was known to the Metropolitan Police as a numbers operator, and less than a year before he had been arrested at a numbers headquarters at another address. Some time prior to the arrests in question, the police received information that he had established his headquarters in his home and from the activities they observed there, they concluded that this information was correct. Before the police could act, however, McDonald moved his activities to the room in Mrs. Terry's house. (R. 21.) On several occasions, the police observed him enter the rooming house early in the afternoon and leave between 5:30 and 6:30 p. m.; the hours during which operations at the headquarters of a numbers game are customarily carried on (R. 21-22). On no occasion while the police had the rooming house under observation did McDonald remain over night (R. 22).

On June 22, 1946, during the afternoon, three police officers surrounded the rooming house. One of the officers heard a noise that sounded like a type-

writer or adding machine in operation, and he knew that adding machines are customarily used in the operation of a numbers game. McDonald had used them before in his illicit lottery activities. (R. 24-25). At this juncture, officer Ogle raised a side window facing on the porch of the house and entered through the window (R. 17). The room he entered proved to be that of Mrs. Terry, the landlady, and Ogle identified himself to her (R. 11, 15). He then opened the front and back doors of the house to admit the other two officers (R. 12, 18). The three officers searched the various rooms on the first floor and then they searched the rooms on the second floor (R. 12-13). When they reached McDonald's room at the rear of the house, they found the door locked (R. 13). Officer Ogle thereupon procured a chair and by standing on it he was able to look through a transom into the room (R. 13). He observed both petitioners in the room, as well as numbers slips, money piled on the table, and adding machines (R. 23). While still standing on the chair, Ogle called to McDonald to open the door, and McDonald did so (R. 23). Petitioners were arrested (see Pet. 3) and the officers seized the machines and papers (see R. 14, 17).

The officers did not have either a warrant of arrest or a search warrant (R. 18). They had discussed the facts they knew concerning McDonald's operations with the United States Com-

missioner, but had not obtained a warrant (R. 24, 26-27).

ARGUMENT

1. The issue here is not whether there was an illegal search of Mrs. Terry's home, but, rather, whether that search invaded the constitutional rights of either of the petitioners. It is settled law in the federal courts that one who is not the victim of an unconstitutional search or seizure has no standing to object to the introduction in evidence of that which was seized. *Goldstein v. United States*, 316 U. S. 114, 121. Both the majority and dissenting judges below recognized (R. 29, 31) that this rule forecloses petitioner Washington. For he was a stranger to the premises and the seized property and merely happened to be in McDonald's room when the arrest and seizure occurred (R. 16, 19). Indeed, in the district court, defense counsel conceded that Washington was "just a visitor" and that his constitutional rights were not infringed (see p. 12 of the stenographic transcript). It is plain, therefore, that petitioner Washington was not aggrieved by the seizure and was not entitled to have the evidence suppressed as to him. *Gibson v. United States*, 149 F. 2d 381 (App. D. C.), certiorari denied *sub. nom. O'Kelley v. United States*, 326 U. S. 724; see also Rule 41 (e), F. R. Crim. P.

2. The situation as to petitioner McDonald is somewhat different. His property was seized

from his room and if the seizure was in violation of the Fourth Amendment, he, of course, was entitled to have the evidence suppressed. It was the view of the courts below, with which we agree, that his motion to suppress was properly denied, because he was not subjected to an illegal search or seizure. The application of the rule discussed above forecloses McDonald from complaining because the police invaded the rights of Mrs. Terry, the landlady.

Brown v. United States, 83 F. 2d 383 (C. C. A. 3), cited by petitioners (Pet. 5), is not in conflict with this conclusion. In that case, the court found that the house was the home of the roomers and, implicitly, that a search of the house, apparently including their rooms, invaded their rights. In this case, the evidence shows that petitioner McDonald had an interest only in his own room, which was used as a headquarters for the conduct of a lottery. His home was at another place. The search of Mrs. Terry's room and the rooms of other roomers could not in any realistic sense have constituted an invasion of McDonald's rights. He had no interest in or right to enter the other rooms in the house (see, e. g., R. 16).

The critical question is whether any of McDonald's rights were invaded. It cannot be denied that the officers gained access to the hallway in front of the door to McDonald's room by means of a trespass into Mrs. Terry's rooming house.

But the prohibition of the Fourth Amendment is not against trespassing; it is against unreasonable searches or seizures. Thus, unless there was an illegal search affecting McDonald, the fact that the police were trespassers in the house does not aid him. *Hester v. United States*, 265 U. S. 57; see *Olmstead v. United States*, 277 U. S. 438, 465.

In our view, McDonald was not subjected to an unlawful search or seizure. Before the police entered his room, one of them merely looked through the transom and observed what was open to view. To see what is visible to the eye is not to search within the meaning of the Fourth Amendment. In *Olmstead v. United States*, 277 U. S. 438, 465, this Court said that even a liberal construction of the Fourth Amendment could not extend "the words search and seizure as to forbid hearing or sight." Thus, police have obtained knowledge of the commission of a crime by looking through windows (*Carvalho v. United States*, 54 F. 2d 232 (C. C. A. 1); *United States v. Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579), through a crack in a door (*Gracie v. United States*, 15 F. 2d 644 (C. C. A. 1)), and through a transom (*Mulrooney v. United States*, 46 F. 2d 995 (C. C. A. 4)). In none of these cases was it even suggested that such means of detecting crime by observation from a vantage point constitute a search. In *Taylor v. United States*, 286 U. S. 1, this Court said, without suggesting that a search had occurred at

that point, that with the knowledge the agents obtained by looking through a small opening and smelling the odor of the whiskey, they had probable cause for obtaining a search warrant. See *Johnson v. United States*, No. 329, O. T. 1947, decided February 2, 1948.¹ And in *Agnello v. United States*, 269 U. S. 20; this Court approved a search and seizure where the arresting officers looking through a window of a home saw what appeared to be an illicit transaction and then "rushed in and arrested all the defendants" (269 U. S. at 28-30). *United States v. Lee*, 274 U. S. 559, 563, where a search light was used to observe what was on a boat, is another illustration of the recognition by this Court of the fact that to see is not to search within the meaning of the Fourth Amendment. Accordingly, we submit that when officer Ogle looked through the transom of petitioner McDonald's room, he did not search it.

It is true that there was a seizure thereafter, but it was not an unreasonable one. When McDonald unlocked his door and admitted the officers, he and his codefendant were arrested (see Pet. 3) and the numbers slips, adding machines, and money were seized. These, of course, were

¹ The present case is unlike *Johnson's* in that from their point of observation outside the room, the officers perceived both the crime and the offenders; the identity of the offenders was known before the officers entered the room. Thus, the entry into the room did not contribute to their knowledge of the crime being committed in their presence. In this aspect, the case is like *Agnello's*, cited in the text.

the instrumentalities of the crimes for which petitioners were arrested and convicted, and, as an incident to the valid arrest,² it was proper to seize them, even without a warrant. *Harris v. United States*, 331 U. S. 145.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied both as to petitioner Washington and petitioner McDonald.

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Attorney.

APRIL 1948.

² With the knowledge officer Ogle obtained by looking through the transom, it is plain that he had probable cause for believing that an offense was then being committed, and he was thus justified in making the arrest without a warrant. In this respect, it is interesting to note that one of the officers testified that in his experience with violations of the character involved here, "if we leave the premises and go to the United States Commissioner's Office, when we return to the premises, I will say in 99 percent of the cases, there will be nothing there" (R. 26).